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Calendar No. 780

101ST CONGRESS *2d Session*	SENATE	REPORT 101-425

CIVIL PENALTY ASSESSMENT DEMONSTRATION PROGRAM OF THE FEDERAL AVIATION ADMINISTRATION

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

H.R. 5131

AUGUST 3 (legislative day, JULY 10), 1990.—Ordered to be printed

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SENATE

REPORT
101-425

CIVIL PENALTY ASSESSMENT DEMONSTRATION PROGRAM OF THE FEDERAL AVIATION ADMINISTRATION

AUGUST 3 (legislative day, JULY 10), 1990.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany H.R. 5131]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (H.R. 5131) to amend the Federal Aviation Act of 1958 to extend the civil penalty assessment demonstration program, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

PURPOSE OF THE BILL

The bill extends for two years, until August 1, 1992, the Federal Aviation Administration (FAA) civil penalty assessment demonstration program.

BACKGROUND AND NEEDS

Congress established the civil penalty assessment demonstration program in 1987 in an effort to strengthen the FAA's safety and security enforcement efforts. Under the provisions of Public Law (P.L.) 100-223, the FAA Administrator (Administrator) is authorized to assess a civil penalty not to exceed $50,000 for violations of the Federal Aviation Act of 1958 (the Act), or any rule, regulation, or order issued thereunder. The cases are initiated by the FAA and heard by an administrative law judge at the Department of Transportation (DOT), with an opportunity for appeal to the Administrator. Judicial review is available in the U.S. Court of Appeals.

Before this program was enacted, the FAA could propose and compromise a civil penalty but could not prosecute civil penalty actions. The FAA was forced, if the penalty could not be settled by

agreement of the parties, to refer the action to a U.S. Attorney for prosecution in U.S. District Court. The process of initiating civil penalty cases in U.S. District Court was lengthy. Frequently, the cases were not pursued because of higher priorities within the U.S. Attorney's office. As a result, many violators who challenged FAA penalties often escaped with no fines whatsoever because the Department of Justice chose to pursue only the most serious violations.

The FAA sought the statutory authority, granted in the 1987 legislation, to hold administrative hearings on civil penalty cases to perform effective and efficient enforcement of the Act. The intent was to send a message to those who violate FAA's safety regulations that a proposed civil penalty would be rigorously pursued and adjudicated. FAA statistics suggest that the program has been effective.

A total of 5,814 notices of proposed civil penalties have been issued. There is simply no feasible way that this number of cases could be prosecuted in U.S. District Court. Sixty-five percent of these cases are for security screening violations. Before the establishment of the program, screening devices and metal detectors at airports were detecting less than 80 percent of the test weapons brought through the airport by FAA inspectors; now the percentage has risen to between 90 and 95 percent.

The FAA's implementation of the program has met with widespread criticism from both aviation and legal groups. The FAA's issuance of its final rules of practice without proper notice or opportunity for prior comment concerned many. The rules of practice promulgated by the FAA also attracted considerable criticism. The Administrative Conference of the United States recommended several procedural changes to the program, and the U.S. Court of Appeals, as the result of a suit brought by the Air Transport Association of America (ATA), directed the FAA to hold further enforcement actions in abeyance until the agency had corrected the procedural deficiencies in the program through rulemaking. (*Air Transport Association* v. *Department of Transportation*, D.C. Cir., No. 89–1195, April 30, 1990).

The original two-year authorization was scheduled to expire December 31, 1989. The Congress has approved legislation granting two short extensions for the program to allow the FAA time to respond to the concerns raised: the first extended the program through April 1990; and the second extended it through July 31, 1990. With respect to the July 31, 1990 extension, the Senate approved that as part of S. 2533 on April 26, 1990, with subsequent House adoption on May 1, 1990. The bill was enacted as Public Law 101–281.

In April 1990, the FAA published a final rule which responded to the criticisms of the Administrative Conference, and in June, published a final rule revising the rules of practice. These FAA actions have largely stilled the storm of protests against the programs as originally implemented.

The Committee believes that the two-year extension in this bill will give the FAA an opportunity to operate the civil penalties program with the appropriate administrative and legal protections in place. After two years, the FAA and the Committee will be in a

position to weigh the results and to judge the worth of the program. The Committee is aware that some in the aviation community believe that safety violations should be adjudicated independently from DOT and the FAA, which have primary responsibility with respect to regulation of aviation matters—preferably by the National Transportation Safety Board (NTSB), which has authority to hear appeals of certificate actions, that is, action which modifies, suspends, or revokes the certificate of an air carrier or an individual. To address this question of appropriate jurisdiction, the bill authorizes $50,000 for the Administrative Conference to do a study and to recommend in 18 months whether the program should continue to be implemented by the FAA, or should be transferred to the NTSB or elsewhere.

The Committee expressed concern in the past over the FAA regulatory policy which assessed civil penalties on publicly owned airports for omissions and acts of airport tenants without any finding of fault on the part of the airport operator. The bill provides that the Administrator may approve the security program of an airport tenant if the program contains the measures by which the security requirements will be executed and the methods by which the airport operator will monitor the tenant's compliance. If the Administrator approves the program and a violation occurs, the airport operator may not be found in violation, so long as the operator has done everything possible to assure tenant compliance.

Legislative History

H.R. 5131 was introduced on June 21, 1990, by Representative Oberstar. The bill was ordered reported by the House Committee on Public Works and Transportation on June 28, 1990, and passed the House of Representatives under suspension of the rules on July 16, 1990.

The bill was referred to the Committee on Commerce, Science, and Transportation. On July 31, 1990, the Committee met in open executive session to consider H.R. 5131, and ordered the bill reported on a voice vote without objection.

Summary of Major Provisions

As reported, the bill:

1. extends the civil penalty assessment demonstration program until August 1, 1992;
2. provides protection from penalties for airport operators whose tenants may have violated security requirements, so long as the airport operator has made every effort to assure tenant compliance with the security program; and
3. authorizes $50,000 for a study to be conducted by the Administrative Conference of the United States to determine whether the authority to adjudicate administrative complaints under the Act should remain with DOT and the FAA, be transferred to NTSB, or be otherwise handled.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 1, 1990.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 5131, an act to amend the Federal Aviation Act of 1958 to extend the civil penalty assessment demonstration program, and for other purposes, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, July 31, 1990.

H.R. 5131 would extend the civil penalty assessment demonstration program until August 1, 1992. The program, which is scheduled to expire at the end of this month, authorizes the Administrator of the Federal Aviation Administration (FAA) to assess civil penalties of up to $50,000. The act also would authorize the Administrator to approve certain security programs of airport operators that incorporate security programs of airport tenants. In addition, H.R. 5131 would require the Administrative Conference of the United States to conduct a study and evaluation of the administrative adjudicatory procedures of the FAA and the National Transportation Safety Board.

H.R. 5131 authorizes the appropriation of $50,000 for 1991 to the Administrative Conference of the United States for the study and evaluation. There would be no significant cost to the federal government associated with the other provisions of the act.

No costs would be incurred by state or local governments as a result of enactment of this legislation.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226–2860.

Sincerely,

Robert D. Reischauer,
Director.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

Number of Persons Covered

The bill provides for a two-year extension of the civil penalty assessment demonstration program. This program is applied by the FAA to all sectors of the aviation industry covered by the Act and

the Federal Aviation Regulations (FAR) as a tool for enforcing safety and security standards.

Economic Impact

The Committee believes that the bill should not impose any significant economic burden on the individuals and businesses affected.

Privacy

The legislation will not have any adverse impact on the personal privacy of the individuals affected.

Paperwork

The Committee does not anticipate any increase in the paperwork burden resulting from a two-year extension of the civil penalty assessment demonstration program.

Section-by-Section Analysis

SECTION 1.—CIVIL PENALTY ASSESSMENT DEMONSTRATION PROGRAM

Section 1 amends section 905(d)(4) of the Act by striking language which authorized the program for a period of 31 months from January 1988 through July 1990, and extending the authorization from the date of enactment until August 1, 1992.

The Committee strongly supports the FAA in its efforts to improve compliance with aviation safety rules and regulations, and believes that aggressive enforcement against violators is an indispensable tool. The Committee recognizes that the FAA committed numerous procedural errors in its original implementation of the program and that, because of those errors, the Committee has been unable until now to recommend a long-term extension of the program. Now that the FAA has reissued its rules after giving interested parties the opportunity to comment, and has altered the rules of practice to reflect the concerns of critics of the program, the Committee expects that the FAA will be able to use the penalty authority for the purposes and in the manner for which the program was established.

SECTION 2.—AIRPORT SECURITY PROGRAMS

Section 2 amends section 316 of the Act by adding a new subsection (g) authorizing the Administrator to approve airport tenants' security programs, provided such programs incorporate the measures by which the tenant will comply with the security requirements imposed by FAA, and provided the programs incorporate methods by which the airport operator will monitor and audit the tenant's compliance with the requirements and will penalize the tenant for violations. If the tenant violates a security requirement and if the airport operator has carried out the measures in its security program to assure compliance, the airport operator shall not be held liable for the violation.

In 1987, at the urging of the Committee, the FAA correctly modified the airport certification regulation (FAR Part 139) to discontin-

ue holding airport operators responsible for monitoring the safety of tenant fueling operations not under the airport's direct control. In Committee Report 101–188, which accompanied an earlier extension of the civil penalty program, the Committee urged the FAA to reconsider its policy of assigning liability solely to airport operators for FAR Part 107 violations by airport tenants. Since the FAA has not acted on the recommendation, it is entirely consistent with the Committee's previously expressed intent to assure the protection of airport operators with legislative language.

SECTION 3.—ADMINISTRATIVE CONFERENCE EVALUATION OF ADJUDICATORY PROCEDURES

Section 3 directs the Administrative Conference of the United States to conduct a study and evaluation of the administrative and adjudicatory procedures of the FAA and the NTSB, and within 18 months to recommend disposition of the civil penalty authority. An amount of $50,000 is authorized to be appropriated for this purpose under subsection (b).

The Committee is keenly aware of the concerns of some aviation groups who believe that the NTSB is the proper agency to have the authority over this program, and consequently, has asked the Administrative Conference to review this matter and advise. Within 18 months of the date of enactment, the Committee will have that report and can consider carefully the recommendations before the expiration date of the demonstration program.

The Committee does not believe that there is anything inherently improper in an agency having authority for both prosecution and resolution of cases; in fact, there are hundreds of such programs in the executive branch. The Committee is also concerned with the enormous backlog of cases currently before the NTSB involving appeals of certificate actions and the average of 20 months required to process such appeals. The Chairman of the NTSB testified before the House Committee on Public Works and Transportation that additional resources would be necessary if any additional responsibilities were to be given to the NTSB. In this regard, on July 31, 1990, the Committee ordered reported legislation reauthorizing the NTSB, which provides for additional employees and should help to address this backlog. The Committee requests that the Administrative Conference examine this resource question in its review and factor it into its recommendations. The Committee will bear this issue in mind when considering the disposition of the program.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL AVIATION ACT OF 1958

Section 316 of that Act

AIR TRANSPORTATION SECURITY RULES AND REGULATIONS

SEC. 316. (a) * * *

(b) through (f) * * *

(g) AIRPORT TENANTS SECURITY PROGRAMS.—The Administrator may approve under this section a security program of an airport operator, and may approve an amendment to a security program of an airport operator approved by the Administrator under subsection (b), which incorporates a security program of an airport tenant (other than an air carrier separately complying with part 108 or 129 of title 14 of the Code of Federal Regulations) having access to the secured areas of the airport—

(1) if such program or amendment incorporates the measures by which the tenant will carry out, within the tenant's leased areas or areas designated for the tenant's exclusive use under an agreement with the airport operator, the security requirements imposed by the Administrator on the airport operator pursuant to the access control system requirements of section 107.14 of such title or to other requirements of part 107 of such title; and

(2) if such program or amendment incorporates the methods by which the airport operator will monitor and audit the tenant's compliance with such security requirements and provides that the tenant will be required to pay financial penalties to the airport operator in the event the tenant fails to carry out any such security requirement in accordance with a contractual provision or requirement imposed by the airport operator.

If the Administrator approves a program or amendment described in this subsection, the airport operator may not be found to be in violation of a requirement of this section in any case in which the airport operator demonstrates that the tenant or an employee, permittee, or invitee of the tenant is responsible for such violation and that the airport operator has complied with all measures in its security program for securing compliance with its security program by the tenant.

Section 905 of that Act

SEC. 905. CIVIL PENALTY ASSESSMENT DEMONSTRATION PROGRAM.

(a) through (c) * * *

(d) LIMITATIONS.—

(1) through (3) * * *

(4) EFFECTIVE PERIOD.—The provisions of this section shall only be in effect for [the 31-month period beginning on the date of enactment of this section] *the period beginning on the date of the enactment of this section and ending on August 1, 1992.*

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